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THE NEW ACT CONCERNING DEMURRERS TO EVIDENCE.

By Hon. S. S. P. Patteson.

One of the most important bills passed by the General Assembly, which adjourned a few days ago, was the following:

"AN ACT,
Relating to Demurrers to Evidence,
Approved March 14, 1906:

1. Be it enacted by the General Assembly of Virginia, That in all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence, *shall state in writing specifically the Grounds of Demurrer Relied On* and the demurree shall not be forced to join in the said demurrer until the specific Grounds upon which the demurrant relies are stated in writing, nor shall any grounds of demurrer not thus specifically stated be considered. After joinder in demurrer no other evidence shall be admitted and a nonsuit shall not be allowed.

A copy-teste:

John W. Williams.
Clerk of the House of Delegates
and Keeper of the Rolls
of Virginia."

March 19th, 1906.

A careful examination will convince any one that this act has dealt a death-blow to the unscientific and barbarous method of pleading by demurrers to evidence and made it impossible to use such demurrers in future, for the purpose of confusing the issues, and improperly eliminating the jury. The demurrer to evidence in Virginia has, for more than a century, caused great dissatisfaction in the profession. While it has not been criticised in our law schools, the Virginia Reports show that it has always been disapproved by the profession. As administered

by the courts, the demurrer has, for years, been the Gibraltar of corporations, especially railroad corporations, in actions, for negligence when the evidence has been conflicting, voluminous and confusing. No relief could possibly have come from the courts, though many eminent judges viewed the practice with disfavor. This appears from the opinion of President Henry St. George Tucker, in the case of Hansbrough's Ex'ors *v.* Thom, 3 Leigh 171, rendered in 1831, where he says:

"* * * * * * * our reports, from Pendleton's time to the present day, bear recorded evidence of the uniformity of the practice in Virginia, of inserting the evidence in the demurrer, putting no admissions upon the record, and leaving the inferences from the evidence, to the court, as is now customary in our tribunals. In all our courts (and there are more than *two hundred* of them) this is the received practice. It would be pregnant with mischief to attempt to change it judicially. On the faith of the decisions of this court, parties litigant have acted, and are perhaps at this moment acting. It is one of those matters of practice which goes to the very right of the parties, and not to form merely; and he who has rested his case upon a demurrer drawn according to the established practice of our courts, may lose his estate through faith in our adjudications, if we should now unexpectedly alter the course of them. * * * * * *"

The form of demurrer heretofore in use is substantially given in 4 Minor Inst. 922.

On and after June 15th, which will be ninety days from the adjournment of the Legislature, the act relating to demurrers to evidence, goes into operation, and after that time the old form of demurrers to evidence can never again be used.

In order to state specifically the grounds of the demurrer, it will be necessary to state also the admitted facts. *Ground* is thus defined in the Century Dictionary, "that which logically necessitates a given judgment or conclusion." The phrase "ground of action" has been defined repeatedly, where used in a statute authorizing the court to allow a declaration to be amended, and it has been held that it is not used in any technical or narrow sense, but must be liberally construed. Nash *v.* Adams, 24 Conn. 33, 39.

A statute authorizing a proceeding, at the instance of the pub-

lic against corporations to have a forfeiture of the charter, or a dissolution of the corporation judicially declared, and a judgment of ouster thereon, and requiring such proceeding to be taken by information by the attorney general in the proper court, "setting forth briefly and without technical terms *the grounds* on which such forfeiture or dissolution is alleged to have been incurred, or to have taken place," means that the information like an indictment or declaration, should state with certainty to a common intent those *facts and circumstances* which consitute the offense in its substance, whether of misfeasance or nonfeasance, so that on its face, if true, it may be seen that there is a specific ground in fact, *and not by conjectural inference,* on which a forfeiture ought to be adjudged. *By requiring the grounds to be set forth, nothing less could be meant than that the facts and circumstances should be set forth.* Atty. Gen'l *v.* Petersburg R. R. Co., 28 N. C. 456. See to the same effect Smith *v.* West, 101 U. S. 266.

It will be impossible to specify (particularize) the grounds of the demurrer under the new act, without setting out in detail, in writing, the admitted facts on which the demurrer rests. No demurrer to the evidence can be received in any other way, because no proposition of law can be stated except on certain facts, nor can the court in any other way pass upon the demurrer. The party tending the demurrer will be bound to set out in writing the facts he admits before he can state his legal objections. The ingenuity of the lawyer will be taxed beyond his power to raise his point in any other way. No recent case in the Virginia Reports will be of any service to him in the application of the new law. It cannot be evaded or avoided. Suppose there is an action for a personal injury and the defense is contributory negligence. The pleader will be compelled to set out in writing what specific facts he admits to be true and then say that the party claiming the benefit of them is not entitled to a verdict, as from the admitted facts he has in law been guilty of contributory negligence and therefore cannot recover. It makes the pleading certain and points out both the facts and law to the court. It takes away all confusion in the administration of justice and prevents a case from being improperly taken from the jury. That it was the purpose of the Legislature to do away with the present confusion and uncertainty is plain to any one familiar with the

arguments advanced in support of the change. In the Senate, where the bill originated, Senator Camm Patteson of Buckingham being its patron, that body had before it the history of the demurrer to evidence, as given by the late Professor James Bradley Thayer, in his profound work, *"A Preliminary Treatise on Evidence at The Common Law,"* p. 235, the greatest, perhaps, which has ever been written, in which he says:

"Near the end of the last century demurrers upon evidence got their death blow in England, by the decision in the case of Gibson *v.* Hunter, carrying down with it also the great case of Lickbarrow *v.* Mason, which, like the former, had come up to the Lords upon such a demurrer.* It was there held that in cases of complication or uncertainty in the evidence, the party demurring must specify upon the record the facts which he admits.

"This decision got rid of the first question, at least of its chief difficulties, and left only the second. It compelled the demurring party to abandon wholly a notion, which seems to have existed in the profession, that by this proceeding he was shifting to the court the duty of "judging the facts" and was thus avoiding the uncertainties of the jury. Always it had been the theory of this sort of demurrer that the demurring party admitted all the evidence of the other side, and all the conclusions therefrom which a jury might lawfully and rightly reach. As regards conclusions of fact, the whole field of rational inference was open to a jury, and a demurrer admitted all that could rationally be found against the party demurring. The decision in Gibson *v.* Hunter, so far as the advisory opinion of the judges may be thought to give the true reasons for it (for this is all we have to go by), had this effect: namely, it compelled the parties to reach an agreement and specification as to what was thus admitted by the demurrer, before the case came to the court *in banc.* The rule now laid down had the effect to adjust below, before the single judge, all debate over this question; the demurring party was required to say, at that stage, exactly what he was admitting; the single judge might compel a joinder in demurrer, when proper admissions were made, and might compel the making

*Gibson *v.* Hunter, 2 H. Bl. 187; Lickbarrow *v.* Mason, Ib. 211. See Lord Blackburn's comments on these cases in Sewell *v.* Burdick, 10 App. Cas. 74, 99 (1884).

of proper admissions by allowing a refusal to join. And thus it was made sure that when the upper court received the case, it came to them purged of mere questions of general reasoning, with all the inferences of fact stated.

"It will easily be perceived that a demurrer upon evidence left open no question whatever in the law of evidence, that is to say of the admissibility of evidence; but only, like other demurrers, questions of substantive law. As the facts out of which these questions of law arose were supposed to be admitted, so all questions relating to the evidence of those facts had become immaterial.*

"This piece of machinery had come to seem a clumsy, dilatory and expensive one. It stopped the trial, and required an entry on the record of all the evidence. And so, when once the demurring party was driven from his vague expectations of getting something out of a court, in the considering of his evidence, which he might not get from a jury; when once it was forced clearly upon his attention, that, not only did a demurrer upon evidence commit him irrevocably to all those inferences from the evidence which were most unfavorable to him, but that he must set these conclusions all down in writing beforehand, then this ancient instrument of justice fell wholly into disuse in England.†

*"For a demurrer upon evidence goes to the law upon the matter, and not to the truth of the fact, for it admits that to be true, but denies the operation of the law thereupon." Lewis *v.* Lark, Plowden, 403, 411 (1571); Fitzharris *v.* Boiun, 1 Lev. 87 (1662); Gibson *v.* Hunter, 2 H. Bl. 187 (1793).

†For the misconception sometimes entertained as to the length to which the admissions of a demurrer upon evidence went, see the discussion in Cocksedge *v.* Fanshaw, 1 Doug. 119 (1779-1783). In that case Davenport, for the party demurring, "insisted that, although a demurrer to evidence admits the truth of all the particular facts, it does not admit the conclusions in point of fact, more than those in point of law, which the party offering the evidence contends for * * *. That, in this respect, the effect of such a demurrer differs from a special verdict, and that it may be used where the party demurring is unwilling to trust the jury with the inference in point of fact."

As to the effect of the rule in Gibson *v.* Hunter, see Lord Blackburn's remarks in the House of Lords, in Sewell *v.* Burdick, 10 App. Cas. 74, 99 (1884). Of the famous opinion of Chief Justice Eyre

It had survived its usefulness and must give place to shorter and more efficient ways of serving the necessities of a new generation. It had come into existence at a time when the general introduction of witnesses to the jury and the requirement that evidence must be given to them publicly in open court, had wrought the first revolution in this great mode of trial."

Since the year 1813 the United States courts have refused to compel parties to join in the demurrer to evidence. It is in the discretion of the Federal trial courts to allow it or not, as they see fit; and the action of the courts in permitting or refusing it is not assignable as error on appeal. (Van Stone *v.* Stillwell & Bierce, Mfgr. Co., 142 U. S. 134, decided in 1891.) This attitude of the Supreme Court of the United States was reached when Chief Justice Marshall was at the zenith of his great powers. The judges had before them the famous case of Gibson *v.* Hunter, 2 H. Bl. 187, which required the party demurring to specify upon the record in writing the facts which he admitted. In the case of Fowle *v.* Common Council of Alexandria, (11 Wheaton 319, decided in February, 1826) Mr. Justice Story delivered the opinion of the court and relied upon and followed the case of Gibson *v.* Hunter, requiring the party to admit upon the record the facts, before the demurrer to the evidence could be received. As this had not been done, the judgment of the lower court in that case, was reversed and judgment entered for the plaintiff.

In Virginia, Judge Moncure, in 1873, delivered the opinion of the court in the case of Trout *v.* R. R. Co., 23 Gratt. 635, which was an action for negligence, in which he held that it was a rule of law in this State that a party may be compelled to join in a demurrer to the evidence if, in the opinion of the court, it is a

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Lord Blackburn says: "He explains it (the demurrer), and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House."

An unfortunate and never corrected misprint in the opinion of C. J. Eyre may properly be mentioned here. At p. 207 of 2 H. Blackstone, where the opinion reads: "If the party who demurs will admit the **evidence** of the fact, the evidence of which fact is loose and indeterminate," etc. Obviously the word "evidence" above printed in **black,** should be "existence."

case in which such joinder should be compelled; in other words, forcing the party to join in a demurrer, and thereby taking the consideration of the case from the jury. All of the other leading cases in Virginia refer to and follow the case of Trout *v.* R. R. Co. But that case itself is founded upon an erroneous conception of the case of Gibson *v.* Hunter, and the unfortunate misprint in the opinion of Chief Justice Eyre.

Judge Moncure in the Virginia case above referred to, approves this definition of a demurrer to the evidence: "The settled practice in Virginia on demurrers to evidence, is that the demurrer shall set out the whole evidence, and that the court may compel the other party to join in the demurrer, without requiring the demurrant to make a formal admission on the record of all the issues of fact which the court may think fairly deducible from the evidence demurred to;" and he further says that "by demurring to the evidence the demurrant waives all evidence on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, but only such facts as are fairly deducible, and refers it to the court to deduce the fair inferences from the evidence." (23 Gratt. p. 637.)

Demurrers to the evidence may first be noted in the reports of the year 1456, (Year Book 34, Henry VI, p. 36, 7.)

The misprint in the report of the case of Gibson *v.* Hunter doubtless caused the Supreme Court of Appeals of Virginia to adhere to this clumsy device.

There was another Virginia Judge besides Chief Justice Marshall, who put himself on record as being opposed to the demurrer to evidence, as used in his time and at the present day. This was Judge Dabney Carr, who was made a judge of the Court of Appeals, in 1824, to fill the vacancy caused by the death of Judge Fleming. He was an intimate friend of William Wirt and a man of great ability.* He delivered an opinion in the celebrated case of Green *v.* Judith, &c. 5 Rand. 2, (decided March, 1827) in which he expresses his views on the subject of demurrers to evidence in such an incisive way, that it appears that he had not only mastered the subject but that he earnestly

*The Green Bag vol. 5, p. 361.

longed for reform of the abuses, which he clearly points out. He advocates the adoption of the rule laid down in Gibson *v.* Hunter and which is now embodied in the new act.

He was a leader of the judicial thought of his time and far in advance of his associates on the bench. He says:

"On the trial of the cause, the defendant demurred to the evidence. The court gave judgment on the demurrer for the plaintiffs, and the defendant appealed. The demurrer contains all the evidence on both sides. This, I believe, is not in conformity with the practice in England or our sister States, but it has long been the settled practice of this State, sanctioned by decisions of this Court. I have always understood a demurrer (whether to pleadings or to evidence) as raising a question of law purely; the demurrant alleging that the pleading or the facts demurred to, are not sufficient *in law* to sustain the adversary. These indeed are the express terms of the demurrer. As the law arises *upon the facts*, it cannot arise until the facts be settled; and this is exclusively the province of the jury. I have seen this subject nowhere treated with more perspicuity or ability, than in the opinion of Ch. J. Eyre, in Gibson *v.* Hunter, 2 H. Bl. 187. He says, "In the first stage of that process under which facts are ascertained, the Judge decides whether the evidence offered conduces to the proof of the fact, and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the jury exclusively. When a jury have ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or in other words, whether the law arising from the fact is in favor of one or the other of the parties, that question is for the Judge to decide. Ordinarily, he declares to the jury what the law is upon the fact which they find, and they compound their verdict of the law and fact thus ascertained. But, if the party wishes to withdraw from the jury, the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury, and to refer to the Judge, the application of the law to the fact.

In the nature of things, therefore, and reasoning by analogy to other demurrers, and having regard to the distinct function of Judges and of juries, and attending to the stage of the proceeding in which the demurrer takes place, the fact is to be first ascertained." The opinion, from which this extract is made, is of the very highest authority, and all the books acknowledge it as settling the law. This Court has, in several cases, referred to it as the ablest exposition of the doctrine on this subject. *The misfortune is, I think, that we have not acted up to the rules it establishes.* One of these is, that the demurrant "shall distinctly admit upon the record every fact and every conclusion, which the evidence demurred to conduced to prove." Our practice has been to put all the evidence on both sides into the demurrer, and then to consider the demurrer, as if the demurrant had admitted all that could be reasonably inferred by the jury from the evidence given by the other party, and waiving all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. I confess the English practice seems to me much the safest and best. In the first place, it is the simplest. The facts being settled, one by one, the parties distinctly see the naked case, and understand precisely on what *facts* the Court will act; and passing these facts thus in review, the demurrant can more clearly see, before the step is irrevocably taken, whether he can safely demur; and the adversary is likewise enabled to discover, whether there be not some weak point in his evidence, which he has it in his power to strengthen. This analysing process, reducing the case to its elements, would also have a strong tendency to discourage demurrers to evidence; an effect, which Courts have generally thought would be beneficial. When the evidence merely is all put into the demurrer, and no facts settled, the parties can have little idea from this confused mass, what the case will be when the Court shall come to act upon it; and the Court itself (it seems to me) is inevitably led to assume the functions of a jury. I have thought it not amiss to express this opinion, though I have not the slightest idea, in the present case, of attempting to disturb the practice.

"I must also be permitted to regret, that it has been settled by

the cases in this Court, that in demurrers to evidence, all the evidence *on both sides* is to be put into the record. It is a departure from the settled practice elsewhere; and this alone, I think, is a solid objection, unless it could be clearly shewn, that by such change a material advantage was gained. But here, the change seems to me to be much for the worse. I can conceive few cases, in which the insertion of the demurrant's evidence *can* be proper; few, in which it does not tend to confuse, perplex, and complicate the case."

One of the latest writers on evidence says of the demurrer to evidence—"It was never a necessary nor ever a very useful piece of legal procedure, and in its final shape, became so dangerous that its use was practically abandoned."*

Some of the ablest lawyers in the Legislature earnestly advocated the bill, among them being Senators J. Boyd Sears, of Mathews, M. J. Fulton, of Warren, Geo. T. Rison, of Pittsylvania and John S. Chapman, of Albemarle and others, and it passed the House of Delegates receiving in that body sixty-seven votes.

The new law will save time and expense and greatly lessen the labors of the courts and judges. It simplifies the procedure, is in the interest of justice, and if it should be found necessary, a much more scientific way can be adopted for passing on questions of law.

A discussion of the numerous Virginia cases since Trout *v.* R. R. Co. can be of no value, as they cannot be cited as authority under the recent act.

The Legislature which has just adjourned deserves the thanks of the public and the profession for having modernized the demurrer to evidence, which, prior to the recent session, was the same in Virginia as it had been in England in 1456, before the discovery of America.

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*McKelvey on Evidence, § 283 where numerous authorities are collected.